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A PROPOSED DRAFT OF A CODE OF CRIMINAL PROCEDURE.

(Report of Committee E of the Institute).¹

WILLIAM E. MIKELL.

The procedural statute herein proposed has been framed after a careful study of the common law and of all the statutes in force in the English speaking jurisdictions of the world. The cases interpreting such statutes have been carefully read. What have been deemed the best features of the systems of criminal accusation in force in these jurisdictions have been incorporated into the system herein proposed. The features which involve the most general changes in the common law system of accusation have been borrowed from statutes in force in English colonies and the more specific provisions have been taken from American statutes.

In order to explain the purpose and effect of the various sections of the proposed act it is necessary to explain the distinction taken in the first section between the terms "the offense" and "the transaction." Every complete criminal accusation informs the accused of two matters which, although they are mixed in the accusation, are none the less really distinct, and should be dealt with separately in a statute concerning accusations. Every complete accusation should inform the accused of what crime he has committed and should also state sufficient matter to differentiate that crime from other crimes of the same nature; i. e., the accusation should show whether the accused is charged with the commission of murder, or robbery, or obtaining property by false pretences, or some other offense, and it should also show who was murdered, what person was robbed and whose and what property was obtained. In this act, the averments which are necessary to show what crime is charged against the defendant are termed averments of "the offense," and averments which show the victims, subjects or objects of the acts charged are termed averments of "the transaction." The term "offense" as used in the cases found in the reports includes what are termed in this act the "offense" and the "transaction" and is frequently used even in the same case to refer to each of these matters, but that is because there are no words in the English language which of themselves express the distinction between them. In the statutes the distinction is felt rather than expressed

¹The membership of this committee is as follows: Prof. W. E. Mikell, Univ. of Pa.; Prof. E. R. Keedy, Northwestern Univ.; Dean Harlan F. Stone, Columbia Univ.

when such a phrase as "the nature of the offense" is used to express what is herein termed the "offense." In *Newcomb v. State*, 37 Miss. 383 (1859), quoted with approval in *State v. Snell*, 24 W. Va. 767 (1884), the same distinction is taken and the term "nature of the accusation" is used to express the term "offense" and "cause of the accusation" to denote "the transaction."

With this discussion of the meaning of these words as used both in the act and in this report, it is possible to explain the purpose of the entire act. Briefly expressed, the proposed system of criminal accusation is this. The first pleading on the part of the state, be it an indictment, information or some other formal pleading, need only state the offense which is to be proved against the person accused. If this be stated such pleading is sufficient to give the court jurisdiction, and if the accused requests no further information, it is sufficient to warrant and sustain a trial and judgment. If, however, the defendant does not request information as to the transaction to be proved, e. g., if he wishes to know the name of his victim or description of property taken or injured, the first pleading may be supplemented by another or other pleadings known as "bills of particulars." There is nothing contained in the act to prevent the stating of the transaction in the first pleading and the expectation is that under Section 6 such information will usually be found in the first pleading. The permissive use of supplemental pleadings does away with the necessity which existed at common law of recommencing the entire proceedings.

The penal codes of New Zealand and Canada, which are almost exactly the same and are adaptations of the code proposed for England by H. L. Stephen and approved by the Law Barons, [see Report of Committee E in JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, Vol. 1, p. 589 (1910).] provide for this system of criminal pleading, as does the Criminal Procedure Code of India.

Only one American state has adopted a system even approximating the system here proposed. That state is Massachusetts (R. L. 1902, ch. 218), the statute of which has been closely followed in this act.²

WILLIAM H. MIKELL, Chairman.

INTERPRETATION.

SECTION 1.—In this act:

The singular number includes the plural and the plural includes the singular.

²The committee wishes to acknowledge the valuable assistance rendered by L. P. Scott, Esq., Gomen Memorial Fellow in the Law School of the University of Pennsylvania, in the preparation of this act.

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The masculine gender includes the feminine and neuter genders.

The words "person," "accused" and similar words include, unless a contrary intention appears, public and private corporations.

The term "act" or "doing of an act" includes "omission to act."

The word "property" includes any matter or thing upon or in respect to which any offense may be committed.

The word "indictment" includes information, presentment, complaint and any other formal written accusation as well as indictment.

The word "indictment," unless a contrary intention appears, includes any count thereof.

The term "writing," "written," and any term of like import includes words printed, painted, engraved, lithographed, photographed or otherwise copied, traced or made visible to the eye.

The term "the court," unless a contrary intention appears, means the court before which the trial is had.

The term "the offense" means the specific offense constituted by the acts or omission of the accused, as distinguished from the term "the transaction," which means the particular acts, facts and circumstances which distinguish the offense committed from other offenses of the same nature. Thus robbery, murder and larceny are different "offenses" and the robbery of C. D. and the robbery of E. F. are different "transactions."

SECTION 2.—Caption.—Any defect, error or omission in the caption or commencement of an indictment may be amended, but if not amended is cured by a verdict.

It is unnecessary to allege that the grand jurors were impanelled, sworn or charged, or that they present the indictment upon their oaths or affirmations.

SECTION 3.—Conclusion.—The indictment need contain no formal conclusion except such conclusion as is required by the constitution of the state.

SECTION 4.—Form.—The indictment may be substantially in the following form:

In the (here give the name of the court) * * * term, 19
(here give the name of the body politic) vs. (here give the name or description of the accused).

The grand jury of the county of.....do present that (here give name or description of the accused) (here set forth the offense and transaction according to the rules hereinafter enunciated).

SECTION 5.—Validity of Indictment.—Every indictment is valid which indicates the offense for which the accused is being prosecuted in one or more of the following ways:

(1) The indictment may indicate the offense by using the specific name given to the offense by the common law or by a statute.

(2) The indictment may indicate the offense by stating so much of the definition of the offense either in terms of common law or of the statute defining the offense or in terms of substantially the same meaning as is sufficient to give the court notice of what offense is intended.

Every indictment which indicates an offense in one or more of the above ways shall be considered to allege that every condition required by law to constitute the offense indicated was fulfilled in the particular case.

The words and phrases used in any indictment to indicate an offense shall be deemed to have been used in the sense attached to them by the law under which the offense is punishable.

SECTION 6.—Sufficiency of Indictment.—Every indictment is valid and sufficient which indicates the offense under Sec. 5, and contains so much detail of the circumstances of the transaction and such particulars as the person (if any) against whom and the thing (if any) in respect to which the offense was committed as are necessary to identify the transaction and to give the accused reasonable notice of the facts.

No indictment which indicates the offense under Sec. 5 shall be quashed, set aside, or dismissed, nor shall any demurrer thereto be sustained on the grounds that it fails to identify the transaction, but the accused shall in such cases be entitled to a bill of particulars in accordance with the provisions of Sec. 8.

SECTION 7.—Forms for Specific Offenses.—The following forms may be used in the cases in which they are applicable, but any other forms authorized by this or any other law may also be used:

Adultery.

A. B., a married man, committed adultery with C. D., or A. B. committed adultery with C. D., a married woman.

Affray.

A. B. and C. D. made an affray.

Assault.

A. B. assaulted C. D.

Assault and Battery.

A. B. committed an assault and battery upon C. D.

Assault with Intent.

A. B. assaulted C. D. with intent to murder, or kill, or rob, or maim him (as the case may be).

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Arson.

A. B. committed arson by burning the dwelling house of C. D.
Attempt.

A. B. attempted to steal from C. D. A. B. attempted to commit larceny of the goods of C. D. A. B. attempted to commit burglary of a building belonging to C. D.

Burglary.

A. B. committed burglary of the house of C. D.

A. B. broke and entered the dwelling house of C. D. in the night time with intent to commit larceny, or murder, or robbery therein (as the case may be).

Conspiracy.

A. B. and C. D. conspired together to murder E. F., or to steal the property of E. F., or to rob E. F. (as the case may be).

Forgery.

A. B. forged a certain instrument purporting to be a promissory note (or describe instrument or give its tenor or substance).

Larceny, Embezzlement and False Pretences.

A. B. stole from C. D. one horse of the value of more than one hundred dollars.

Murder.

A. B. murdered C. D. (add a statement of the degree of murder if murder in the first degree is not intended to be charged).

Manslaughter.

A. B. killed C. D. (add a statement of the degree or form of manslaughter if the highest degree or form of manslaughter is not intended to be charged).

Perjury.

A. B. appeared as a witness in a case between C. D. and E. F. being heard before the (set forth the tribunal) and committed perjury by testifying as follows (set forth the testimony).

Rape.

A. B. raped or ravished C. D.

Robbery.

A. B. robbed C. D.

SECTION 8.—Bills of Particulars.—(a) When an indictment indicates an offense in accordance with Sec. 5 but does not inform the accused of the nature and cause of the accusation against him, the prosecuting officer may of his own motion, and shall when ordered by the court, which in all cases shall so order at the request of the accused, file a bill of particulars as may be necessary to give the accused information of the nature and cause of the accusation against him.

(b) When information not set out in the indictment or in any previous bill of particulars, or not given to the accused in the course of the proceedings against him is desirable for the defense of the accused upon the merits of the case, the prosecuting officer may of his own motion or on request of the accused, and shall upon being ordered by the court, which may so order of its own motion or on motion of the accused, file a bill of particulars of such matters. In determining whether further information and if so what information is desirable for the defense of the accused upon the merits of the case, the court shall consider the whole record of the case and the entire course of the proceedings against the accused.

Supplemental bills of particulars may be filed under conditions above stated.

Each bill of particulars furnished shall amend the indictment and each and every previous bill in all matters alleged therein in order to identify the transaction in which an inconsistency, repugnancy or more detailed allegation appears.

When any bill of particulars as aforesaid is delivered to the court, it shall be filed with the indictment, and a copy thereof given to the accused upon his request.

When any bill of particulars as aforesaid is delivered the trial shall proceed in all respects as if the indictment had been amended in conformity with such bill of particulars.

SECTION 9.—Quashing the Indictment.—If the statement of the particulars in any bill of particulars furnished under Sec. 8 is inconsistent with the commission of the offense indicated in the indictment, or shows on its face that an indictment for such offense is barred by the Statute of Limitations, the court may quash the indictment unless the prosecuting officer shall file another bill of particulars which so states the transactions as to show that the transaction constitutes the offense indicated in the indictment, and that it is not barred by the Statute of Limitations.

SECTION 10.—Name of Person Accused.—In any indictment or bill of particulars it is sufficient for the purpose of identifying the accused to state his true name, to state the name, appellation or nickname by which he has been or is known, to state a fictitious name, or to describe him as a person whose name is unknown or to describe him in any other manner. In stating the two names or the name by which the accused has been or is known or a fictitious name, it is sufficient to state a surname, a surname and one or more Christian name or names, or a surname and one or more abbreviations or initials of a Christian name or names.

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If the accused be a corporation, it is sufficient to state the true corporate name or any name or designation by which it has been or is known. This is a sufficient averment that the corporation is a corporation and that it was duly incorporated according to law.

If the court before which the prisoner is arraigned or called upon to plead is satisfied by affidavit and hearing thereof or by other means that the person arraigned or called upon to plead is not the person intended to be indicted, it shall discharge such person from custody under such indictment.

If in the course of the proceeding the true name of a person indicted otherwise than by his true name is disclosed by the accused or by the evidence, the court shall on motion of the accused or of the prosecuting officer, and may without such motion, insert the true name of the accused wherever his name appears otherwise in the indictment and record, and the proceedings shall be continued against him in his true name.

No indictment or bill of particulars need state the addition, degree, estate, mystery, occupation, title or residence of the accused.

In no case is it necessary to aver or prove that the true name of the accused is unknown to the grand jury.

SECTION 11.—Time.—The indictment need contain no direct allegation of the time of the commission of the offense except such as is necessary to indicate the offense under Sec. 5.

The allegation of the indictment that the accused committed the offense shall in all cases be considered an allegation that the offense was committed before the finding of the indictment, after it became an offense, and within the period of limitations prescribed by law for the prosecution of the offense.

All allegations of the indictment and bill of particulars shall, unless properly stated otherwise, be considered to refer to the same time.

SECTION 12.—Place.—The indictment need contain no direct allegation of the place of the commission of the offense except such as is necessary to indicate the offense under Sec. 5.

The allegation of the indictment that the accused committed the offense shall in all cases be considered an allegation that the offense was committed within the territorial jurisdiction of the court.

All allegations of the indictment and bill of particulars shall, unless properly stated otherwise, be considered to refer to the same place.

SECTION 12.—Means.—The indictment need contain no allegation of the means by which the offense was committed except such as is necessary to indicate the offense under Sec. 5.

SECTION 14.—Value and Price.—The indictment need not allege the value or price of any property unless an allegation thereof is necessary to indicate the offense under Sec. 5, and in such case it is sufficient to aver that the value or price of the property equals or exceeds the certain value or price which determines the offense. The facts which give the property such value need not be alleged.

SECTION 15.—Ownership.—It is not necessary to allege ownership of any property mentioned in an indictment unless such allegation is necessary to indicate the offense under Sec. 5.

In all cases in which an allegation of ownership of any property in an indictment or bill of particulars is supported by proof of a right of possession of such property any statement in the indictment or bill of particulars which implies possession of such property by such person is a sufficient allegation of ownership.

SECTION 16.—Intent.—In an indictment in which it is necessary for the purpose of indicating the offense under Sec. 5 to allege an intent to defraud or injure, it is sufficient to allege generally an intent to defraud or injure without alleging an intent to defraud or injure any particular person.

SECTION 17.—Characterization of Act.—The indictment need not allege that the offense was committed or the act done “feloniously” or “traitorously” or “unlawfully” or “with force and arms” or “with a strong hand” nor need it use any phrase of like kind otherwise to characterize the offense, nor need it allege that the offense was committed or the act done “burglariously,” “wilfully,” “knowingly,” “maliciously,” “negligently,” nor need it otherwise characterize the manner of the commission of the offense unless such description is necessary to indicate the offense under Sec. 5.

The indictment need not contain the words “as appears by the record” or any other words of similar import.

The indictment need not allege any matters not required to be proved.

SECTION 18.—Descriptive Allegations (General).—In an indictment in which it is necessary for the purpose of indicating the offense under Sec. 5 to describe any person, place or thing, it is sufficient to describe such person, place or thing by any term which in common understanding embraces such person, place or thing and in common understanding does not include persons, places or things which are not by law the subject of or connected with the offense.

SECTION 19.—Name of Person Other Than Accused.—In any indictment or bill of particulars furnished under the provisions of subsection (a) of section 8 of this act, it is sufficient for the purpose of indentifying any person other than the accused to state his true name,

to state the name, appellation or nickname by which he has been or is known, to state a fictitious name, to state the name of an office or position held by him, to describe him in any manner or to describe him as "a certain person" or by words of similar import. In stating the true name of such person or the name by which such person has been or is known it is sufficient to state a surname or a surname and one or more Christian name or names or a surname and one or more abbreviations or initials of a Christian name or names.

It is sufficient for the purpose of identifying any group or association of persons, not incorporated, to state the proper name of such group or association (if such there be), to state any name or designation by which the group or association has been or is known, to state the names of all the persons in such group or association or of one or more of them, or to state the name or names of one or more persons in such group or association, referring to the other or others as "another" or "others."

It is sufficient for the purpose of indentifying a corporation to state the corporate name of such corporation, or any name or designation by which such corporation has been or is known.

It is not necessary for the purpose of identifying any group or association of persons or any corporation to state the legal form of such group or association of persons or of such corporation.

In no case is it necessary to aver or prove that the true name of any person, group or association of persons or corporations is unknown to the grand jury.

If in the court of the trial the true name of any person, group or association of persons, or corporation identified otherwise than by the true name is disclosed by the evidence, the court shall, on motion of the accused, and may without such motion, insert the true name in the indictment or bill of particulars wherever the name appears otherwise.

SECTION 20.—Property Described as Money.—In an indictment or bill of particulars furnished under the provisions of sub-section (a) of section 8 of this act, for larceny, embezzlements, robbery, obtaining property by false pretences, receiving stolen property or for any other criminal conversion or misappropriation of property, where the offense relates to currency, treasury notes, certificates, banknotes and other securities intended to circulate as money, and promissory notes, checks, drafts, bills of exchange, postal orders, and all other negotiable securities for debt or evidence of debt or any of them it is sufficient to describe the same or any of them as money, without specifying the particular character, number, denomination, kind, species, or nature thereof.

SECTION 21.—Property Described as Funds.—In an indictment

or bill of particulars furnished under the provisions of sub-section (a) of section 8 of this act, for larceny, embezzlement, robbery, obtaining property by false pretences, receiving stolen property or for any other criminal conversion or misappropriation of property where the offense relates to certificates of stock, stocks, bonds, bills of lading, mortgages and all other non-negotiable securities for debt or evidence of debt or property, or any of them it is sufficient to describe the same or any of them as funds, without specifying the particular character, number, denomination, kind, species or nature thereof.

SECTION 22.—Description of Written Instrument.—Whenever in an indictment or bill of particulars furnished under the provisions of sub-section (a) of section 8 of this act, an allegation relative to any instrument which consists wholly or in part of writing or figures, pictures or designs is necessary, it is sufficient to describe such instrument by any name or description by which it is usually known or by its purport without setting forth a copy or facsimile of the whole or any part thereof.

SECTION 23.—Description of Written Matter.—Whenever in an indictment or bill of particulars furnished under the provisions of sub-section (a) of section 8 of this act, an averment relative to any spoken or written word or to any picture is necessary, it is sufficient to set forth such spoken or written words by their general purport or to describe such picture generally without setting forth a copy or facsimile of such written words or such picture.

SECTION 24.—Meaning of Words and Phrases.—The words and phrases used in an indictment or bill of particulars are to be construed according to their usual acceptance, except words and phrases which have been defined by law or which have acquired a legal signification, which words and phrases are to be construed according to their legal signification and shall be sufficient to convey such meaning.

SECTION 25.—Previous Convictions.—Whenever it is necessary to allege a prior conviction of the accused in an indictment it is sufficient to allege that the accused was at a certain stated time, in a certain stated court, convicted of a certain stated offense, giving the name of the offense, if it have one, or stating the substantial elements thereof.

SECTION 26.—Private Statutes.—In pleading a private statute or a right derived therefrom it is sufficient to refer to the statute by its title and the day of its passage or in any other manner which identifies the statute and the court must thereupon take judicial notice thereof.

SECTION 27.—Judgments.—In pleading a judgment or other determination of, or a proceeding before any court or officer, civil or military, it is unnecessary to allege the facts conferring jurisdiction

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on such court or officer, but it is sufficient to allege generally that such judgment or determination was duly given or made or such proceedings had.

SECTION 28.—Exceptions.—No indictment for any offense created or defined by statute shall be deemed objectionable for the reason that it fails to negative any exception, excuse or proviso contained in the statute creating or defining the offense.

The fact that the charge is made shall be considered as an allegation that no legal excuse for the doing of the act exists in the particular case.

SECTION 29.—Alternative Allegations.—In an indictment or bill of particulars for an offense which is constituted of one or more of several acts, or which may be committed by one or more of several means, or with one or more of several intents, or which may produce one or more of several results, two or more of such acts, means, intents, or results may be charged in the alternative.

SECTION 30.—Indirect Allegations.—No indictment or bill of particulars is invalid or insufficient for the reason merely that it alleges indirectly and by inference instead of directly any matters, facts and circumstances connected with or constituting the offense, provided that the nature and cause of the accusation can be understood by a person of common understanding.

SECTION 31.—Larceny and Stealing.—The terms “larceny” and “stealing” when used in any indictment have each the following signification: The criminal taking, obtaining or converting of personal property; including all forms of larceny, embezzlement and obtaining by criminal false pretence.

In an indictment for larceny, embezzlement, or obtaining by criminal false pretence, it is sufficient to allege that the accused stole the property which is the subject of the offense, and such indictment shall be supported by proof that the accused committed larceny of the property or embezzled it or obtained it by criminal false pretence.

SECTION 32.—Libel.—An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libelled of the defamatory matter on which the indictment is founded, but it is sufficient to state generally that the same was published concerning him.

SECTION 33.—Perjury and Kindred Offenses.—An indictment or bill of particulars for perjury or for subornation of, solicitation, conspiracy or attempt to commit perjury is sufficient which indicates the offense for which the accused is prosecuted, the nature of the controversy in respect of which the offense was committed and before

what court or officer the oath was taken or was to have been taken, without setting forth any part of the records or proceedings with which the oath was connected, and without stating the commission or authority of the court or other authority before whom the perjury was committed or was to have been committed or the form of the oath or affirmation or the manner of administering the same.

SECTION 34.—Homicide.—In an indictment for murder it is sufficient to charge that the accused murdered the deceased, adding a statement of the degree of murder, if murder in the first degree is not intended to be charged, and in an indictment for manslaughter it is sufficient to charge that the accused killed the deceased, adding a statement of the degree or form of manslaughter if the highest degree or form of manslaughter is not intended to be charged.

SECTION 35.—Principal and Accessory.—Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures counsels, aids, or abets in its commission, may hereafter be prosecuted, indicted, tried, and on conviction shall be punished as if he had directly committed such offense.

SECTION 36.—Repugnancy.—No indictment is invalid by reason of any repugnant allegation contained therein, provided that an offense is indicated under Sec. 5.

SECTION 37.—Surplusage.—Any allegation herein stated to be unnecessary, may, if contained in any indictment, be rejected as surplusage.

SECTION 38.—Defects, Variances and Amendment Thereof.—No indictment is invalid because of any defect or imperfection in or omission of any matter of form only, nor because of any miswriting, misspelling or false or improper English, nor because of the use of foreign words or signs, symbols or abbreviations, nor because of any other defect, imperfection or omission in the manner of charging the offense, or describing the transaction, provided that the indictment indicates an offense in accordance with the provisions of Sec. 5.

No variance between those allegations of an indictment or of any bill of particulars, which identify the transaction under Sec. 5, whether amended or not, and the evidence offered in support thereof shall be grounds for the acquittal of the accused.

The court may at any time amend the indictment or bill of particulars in respect to any such defect, imperfection or omission as above stated and may at any time amend the indictment or bill of particulars as to any such variance as above stated to conform to the evidence.

If the court is of the opinion that the accused has been actually

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misled and prejudiced in his defense upon the merits of any such defect, imperfection or omission or by any such variance the court may of its own motion, unless the accused objects, or on motion of the accused postpone the trial, to be had before the same or another jury, on such terms as the court sees fit. In determining whether the accused has been misled and prejudiced in his defense upon the merits the court shall consider all the circumstances of the case and the entire course of the prosecution.

No motion made after verdict nor writ of error nor appeal based on any such defect, imperfection or omission or based on any such variance shall be sustained unless it be affirmatively shown that the accused was in fact prejudiced in his defense upon the merits and a failure of justice has resulted.

SECTION 39.—Misjoinder, Multiplicity and Multifariousness.—No indictment shall be quashed, set aside or dismissed nor shall any demurrer thereto be sustained for any one or more of the following defects merely: (First) That there is a misjoinder of the parties accused. (Second) That there is a misjoinder of the offenses charged in the indictment, or duplicity therein. (Third) That any uncertainty or multiplicity exists therein.

If the court be of the opinion that the first and second defects or either of them exists in any indictment it may sever such indictment into separate indictments or into separate counts as shall be proper.

If the court be of the opinion that the third defect exists in any indictment it may order that a bill of particulars be filed in accordance with Sec. 8.

No motion made after verdict nor writ of error nor appeal based on the defects enumerated in this section shall be granted or sustained unless it be affirmatively shown that the accused was in fact prejudiced in his defense upon the merits and a failure of justice has resulted.

SECTION 40.—Amendment After Verdict.—The accused and the prosecuting officer are entitled upon motion made by either after verdict and before sentence or discharge to have the indictment amended so as to state the acts, facts and circumstances of the offense and the names or descriptions of persons, places and things connected therewith and the time and place of the commission of the offense as proved by the evidence, in such a manner that the indictment shall without evidence, aliunde, be such evidence of the prosecution as to bar a subsequent prosecution for the same offense.

SECTION 41.—Interpretation of the Act.—Nothing in this act shall be interpreted in such a manner as to make invalid any indictment at present valid nor to make improper any verdict at present proper.